2966 No. 15066

United States
Court of Appeals
for the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Arizona

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-11-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Arizona

No. C-12340 Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD BLOCH,

Defendant.

INDICTMENT

(Viol.: 26 U.S.C. 2554(a) and 26 U.S.C. 2554(g)—Sale of narcotics not pursuant to written order form, and obtaining narcotics by means of order forms not pursuant to lawful business nor legitimate practice of profession.)

The Grand Jury charges:

Count I.
(26 U.S.C. 2554(a))

That on or about the 24th day of September, 1953, within the County of Maricopa, State and District of Arizona, Bernard Bloch, did then and there knowingly, wilfully, fraudulently and feloniously sell to one R. S. Cantu, a certain quantity of narcotic drug, to wit, approximately 10 c.c. of morphine sulfate, which said sale was not in pursuance of a written order of the said R. S. Cantu to the said Bernard Bloch on a form issued in blank for that purpose by the Secretary of the Treasury of the

United States, as required by Act of Congress of December 17, 1914, and which said sale was not in the course of professional practice as a physician, and R. S. Cantu not being a patient of the said Bernard Bloch, and which said sale was not pursuant to a prescription.

Count II.
(26 U.S.C. 2554(a))

On or about the 29th day of October, 1953, within the County of Maricopa, State and District of Arizona, Bernard Bloch did then and there, knowingly, wilfully, fraudulently and feloniously sell to one R. S. Cantu a certain quantity of narcotic drug, to wit, approximately 10 c.c. morphine solution, which said sale was not in pursuance of a written order of the said R. S. Cantu to the said Bernard Bloch, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by law, and which said sale was not in the course of professional practice as a physician, nor pursuant to a prescription.

Count IV.
(26 U.S.C. 2554(a))

On or about the 30th day of October, 1953, within the County of Maricopa, State and District of Arizona, Bernard Bloch did unlawfully, wilfully, fraudulently and feloniously sell to one R. S. Cantu a certain quantity of narcotic drugs, to wit, two 1/20 grain tablets of dilaudid, and 10 c.c. of mor-

phine, which sale was not in pursuance of a written order of the said R. S. Santu to the said Bernard Bloch on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as provided by law, and which said sale was not in the course of professional practice as a physician and not pursuant to a prescription.

Count V.
(26 U.S.C. 2554(a))

On or about November 10, 1953, within the County of Maricopa, State and District of Arizona, Bernard Bloch, did unlawfully, fraudulently and feloniously sell to one R. S. Cantu a certain quantity of narcotic drug, to wit, 30 c.c. of morphine hydrochloride which said sale was not in pursuance of a written order of the said R. S. Cantu to the said Bernard Bloch on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as is required by law, the said R. S. Cantu not being then and there a patient of the said Bernard Bloch, the said morphine being then and there sold and distributed by the said Bernard Bloch, not in the course of his professional practice as a physician, and not pursuant to a prescription.

Count VII.
(26 U.S.C. 2554(a))

On or about the 16th day of November, 1953, within the County of Maricopa, State and District of Arizona, Bernard Bloch did unlawfully, wilfully

and feloniously sell to one R. S. Cantu a certain quantity of narcotic drug, to wit, 10 c.c. of morphine solution, which said sale was not in pursuance of a written order of the said R. S. Cantu to the said Bernard Bloch on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, as required by law, and the said R. S. Cantu not being then and there a patient of the said Bernard Bloch, and the said narcotic drug was not sold by the defendant Bernard Bloch in the course of his professional practice as a physician, and not sold pursuant to a prescription.

Count VIII.
(26 U.S.C. 2554(a))

On or about the 19th day of November, 1953, within the County of Maricopa, State and District of Arizona, Bernard Bloch did unlawfully, intentionally and feloniously sell to one R. S. Cantu a certain quantity of narcotic drug, to wit, approximately 20 c.c. of morphine, which said sale was not in pursuance to the written order of the said R. S. Cantu to the said Bernard Bloch on a form issued for that purpose by the Secretary of the Treasury of the United States, as required by law, and the said R. S. Cantu was not then and there a patient of the said Bernard Bloch, and the said narcotic drug was then and there sold by defendant Bernard Bloch not in the course of his professional practice as a physician, and not pursuant to a prescription.

A True Bill.

/s/ JO ABBOTT,
Foreman.

/s/ JACK D. H. HAYS,
United States Attorney.

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant, Bernard Bloch, Guilty as charged in count 1; Guilty as charged in count 2; Guilty as charged in count 4; Guilty as charged in count 5; Guilty as charged in count 7; Guilty as charged in count 8.

/s/ JAMES W. ENYAIT,
Foreman.

May 27th, 1954.

[Endorsed]: Filed May 27, 1954.

In the United States District Court
for the District of Arizona
No. C-12340 Phx.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BERNARD BLOCH,
Defendant.

JUDGMENT AND COMMITMENT

On this 6th day of July, 1954, at Phoenix, Arizona, came the attorney for the Government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violating Title 26, United States Code, Section 2554(a), (Unlawful and felonious sale of narcotics), as charged in counts 1, 2, 4, 5, 7 and 8.

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court, It is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the

United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVE W. LING,
United States District Judge.

[Endorsed]: Filed July 6, 1954.

In the United States District Court
for the District of Arizona

No. C-12340 Phx.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BERNARD BLOCH,
Defendant.

AMENDED MOTION FOR NEW TRIAL
Monday, December 20, 1954

Before: Honorable Dave W. Ling, Judge.

Appearances:

JACK D. H. HAYS,
U. S. District Attorney, By
ROBERT S. MURLLESS,
Asst. U. S. District Attorney,
For the Plaintiff.

FRANK E. FLYNN,
For the Defendant.

The Clerk: C-12,340, United States of America vs. Bernard Bloch. Defendant's amended motion for new trial.

Mr. Murlless: The Government is ready, your Honor.

Mr. Flynn: Ready.

The Court: What is the ruling of the Court of Appeals in regard to this motion?

Mr. Flynn: I don't have the case, your Honor, but under Rule 33, the case is cited in Government counsel's memorandum citing the cases, and in substance the Circuit Court of Appeals held that a motion for new trial on the grounds of newly discovered evidence while an appeal was pending—and petition was made to remand in that case as in this case—and in that decision they held they would not rule upon the petition to remand until there was an indication from the trial court as to whether or not he would grant the motion if it were before him.

I don't know any other way to get that indication except by hearing. The Court can't grant it because the jurisdiction is now in the Circuit Court, but if the record would show the indication we would have something to go on.

The Court: All right. Go ahead. Do you want to call some witnesses?

Mr. Flynn: Yes. I call Mr. Hernandez.

I would like to call the Court's attention that this motion is based upon the affidavit attached to it, and also [2*] the affidavit attached to the original

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

motion of Mr. Hernandez. I am not making a part of this record the affidavit of Mrs. Hernandez, but on the original motion, Hernandez's affidavit is referred to in my motion and made a part of this motion, but there are some additional facts I would like to have brought out.

The Court: All right.

GILBERT REESE HERNANDEZ

called as a witness in behalf of the Defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Flynn:

Q. State your full name, please?

A. Gilbert Reese Hernandez.

Q. And you live here in Phoenix?

A. Yes, sir.

Q. Are you married? A. Yes, sir.

Q. Mr. Hernandez, you were working with the Government narcotic agents in connection with the investigation of Dr. Bloch last year, is that correct, during 1953?

A. I wasn't employed by them then.

Q. Well, you worked with them. Are you the one who introduced Mr. Cantu to Dr. Bloch? [3]

A. Yes, sir.

Q. Prior to that time Dr. Bloch had been administering for you, giving you prescriptions?

A. Not prescriptions.

Q. He had been furnishing you with medicine?

A. That is right.

(Testimony of Gilbert Reese Hernandez.)

Q. That contained some narcotic, is that correct?

A. That is right.

Q. Now, at whose request did you take Mr. Cantu to Dr. Bloch's office?

A. Mr. Earl Moore, Mr. George Dowel, Mr. Ross, I guess, asked them to come to me.

Q. And who were those men? What is their business, the people you named?

A. Narcotic officers.

Q. What? A. Narcotic officers.

Q. And you did take Mr. Cantu to Dr. Bloch's office? A. That is right.

Q. And introduced him as your brother?

A. That is right.

Q. Now, at that time was Dr. Bloch informed either by you or in Cantu's presence, or by Cantu that he wanted some narcotics?

A. He wanted narcotics. He posed as my brother. [4]

Q. Yes?

A. I introduced him as my brother addict.

Q. At that time was Dr. Bloch informed by you or Mr. Cantu in the presence of all of you that Cantu was an addict and needed narcotics for himself? A. Yes, he knew that.

Q. And at that time, Mr. Hernandez, was anything said by either you or Mr. Cantu about wanting narcotics for some girls that were working for Cantu in a hotel? A. Not in my presence.

Q. Not in your presence? A. No.

Q. Were you there during all this conversation

that day? A. Yes, sir.

Q. Until you left? A. Yes, sir.

Q. Now, prior to that, or after that and prior to the trial of Dr. Bloch, or prior to his arrest, you didn't go there any more with Cantu, did you?

A. Never.

Q. Prior to that time, had you been using narcotics yourself? A. Before that?

Q. Yes. [5] A. Before we went up there?

Q. Yes. A. Yes.

Q. Where did you get the narcotics, outside of the medicine containing narcotics that Dr. Bloch gave you? Did you get any from anybody else?

A. Yes.

Q. From whom? A. Narcotic officers.

Q. Which ones?

A. Mr. Ross and Mr. Cantu.

Q. On how many occasions, and what kind of narcotics did they furnish you?

A. Opium and heroin.

Q. And did you use that for yourself, for your own use? A. Yes, sir.

Q. Now, since the trial, Mr. Hernandez, you made an affidavit setting out what occurred there at the time you introduced Cantu to Dr. Bloch, did you not? A. Yes, sir.

Q. And since that time have the narcotic agents, either Mr. Cantu or Mr. Ross, contacted you? Have they talked to you or come to see you?

A. After?

Q. Yes, any time within the last six months? [6]

A. Yes.

(Testimony of Gilbert Reese Hernandez.)

Q. And where did they see you?

A. He came to my home.

Q. Did you give, or did you sign any statements for them since that time? A. Yes.

Q. And where was that?

A. In Mr. Ross' office.

Q. And how did you get to Mr. Ross' office?

A. He came the day before to my home. He said he wanted to see me in his office. I didn't go up, and he came and picked me up and took me up to his office.

Q. He picked you up and took you up to his office? A. Yes, sir.

Q. And you made a statement or signed a written statement? A. Yes, sir.

Q. At that time was there any threat or promises by the narcotic agents before you signed that?

A. Yes, sir.

Q. What did they say?

A. For me to leave town.

Mr. Murlless: If the Court please, I object to that and move it be stricken unless he can fix the time and place and who was present. [7]

The Court: What would that have to do with the motion for new trial, something that occurred after the trial?

Mr. Flynn: Except to discredit Cantu's testimony.

The Court: The Jury believed him. I don't think that is admissible.

Mr. Flynn: That is all.

Mr. Murlless: No questions.

(Witness excused.)

Mr. Flynn: I would like to call Mr. Dobbs.

Mr. Murlless: May we move for that to be stricken out, if your Honor please, as we wish to contend that it is both irrelevant and immaterial and has no relation to the issues that were tried in the case. May the testimony of Hernandez be stricken out?

The Court: Well, there might be some few words he said that shouldn't be stricken. You make a blanket motion. I don't know what you refer to. The last part, anything that occurred subsequent to the trial, of course, you can't base a new trial on that.

Mr. Murlless: Yes. I am sure that the Government wouldn't be expected to make Hernandez its witness, but could we reserve time for the cross-examination of the witness Hernandez?

The Court: I don't understand what you are talking about.

Mr. Murlless: May we after this—we wouldn't wish, and [8] I don't think the Court would expect the Government to make Hernandez the government's witness.

The Court: I don't care what the Government does. The Government can do just as it pleases.

Mr. Flynn: Go ahead and be sworn.

BERT C. DOBBS

was called as a witness for the Defendant, and was duly sworn.

Mr. Flynn: In view of the Court's ruling, I would like to announce, in fact, make an offer of proof, and to save the time examining this witness if the Court will not permit the examination.

We offer to prove by this witness that the testimony would corroborate the testimony given by Hernandez, that Hernandez was furnished with narcotics during the time and prior to Dr. Bloch's arrest, and during the time he was connected with the investigation of Dr. Bloch.

The Court: By the narcotics officer?

Mr. Flynn: Yes, by the narcotics officer.

The Court: Well, I don't think that would make any difference one way or the other. So if there is an objection I will sustain it.

Mr. Murlless: Yes, if your Honor please.

The Court: Is there anything further the witness would testify?

Mr. Flynn: That is all, your Honor. That testimony [9] and the affidavit attached to the motion are the basis for our motion.

The Court: All right. The motion will be denied.

(Which was all the proceedings had in the above-entitled matter at said time and place.)

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 3rd day of May, A.D. 1956.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed May 4, 1956, U.S.D.C.

[Endorsed]: Filed May 7, 1956, U.S.C.A. [10]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the United States of America and to Its Attorneys, Jack D. H. Hays, United States Attorney, and Robert S. Murlless, and Deputy Holohan:

Please Take Notice that Bernard Bloch, the defendant in the above-entitled case, will move the Honorable Judge David Ling, in the United States District Court for the District of Arizona, on February 13th, 1956, at the Courthouse in Phoenix, Arizona, at the hour of 10:00 a.m., or as soon thereafter as said Motion can be heard, to vacate and set aside the judgments in the above-entitled case and grant a new trial, pursuant to Rule 33 of Rules of Criminal Procedure for the District Courts of the United

States, on each of the grounds and points and authorities set out in the written Motion attached hereto and made a part hereof, and upon the affidavits and testimony taken heretofore in support thereof.

Said Motion will be made upon the records and files of the case, the judicial notice of the opinions of the United States Court of Appeals for the Ninth Circuit, the affidavits in support of the Motion, and the testimony heretofore taken on hearing in connection with the case, and upon all the records and files and proceedings had herein, and upon the written Motion and Notice of Motion.

Dated: February 9th, 1956.

By /s/ ROBERT RENAUD,
Attorney for Defendant.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes Now the defendant Bernard Bloch and moves for a new trial within the meaning of Rule 33 of the Rules of Criminal Procedure for the District Courts of the United States, on the following grounds, to wit:

I.

The court and jury acted under a mistake of fact at the time of the trial; namely, that the defendant was convicted of a felony, which conviction was

subsequently and since the trial of the action reversed, and therefore a new trial is required in the interest of justice, since the case rested upon the belief of the jury in the credibility of either R. S. Cantu or the defendant.

II.

The conviction is null and void as being based upon false and perjured testimony produced by an agent of the government, and knowingly used to convict the defendant; that the use of such testimony violated the defendant's constitutional rights under the due process clause of the Fifth Amendment to the Constitution of the United States.

III.

The government wilfully and deliberately suppressed evidence, to wit: The testimony of Gilbert Hernandez, employed as a special undercover agent of the government, which testimony, if produced, would have contradicted R. S. Cantu, special agent of the government, that Hernandez told the defendant Bloch that Cantu's "girls needed treatment," and that Cantu told Dr. Bloch that he had girls working for him and needed narcotics for these girls.

IV.

That the defendant was unlawfully entrapped, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and that the judgments against him, and each of them, are null and void for that reason.

The said Motion will be based upon the judicial notice of the Court of the opinions of the United States Court of Appeals for the Ninth Circuit, in Bloch v. United States, 221 Fed. 2d 786 and 223 Fed. 2d 297, and the opinion of this court in Bloch v. United States in this case; the affidavits of Bernard Bloch, Gilbert Hernandez, and all proceedings had on the Amended Motion for a New Trial on December 20th, 1954, in the District Court of the United States at Phoenix, Arizona, including the testimony of Bert C. Dobbs and Gilbert Hernandez given at that time, and the affidavit attached to the original motion of Mr. Hernandez, and all other proceedings in the case.

McKESSON & RENAUD, and

/s/ MORRIS LAVINE,

By /s/ MORRIS LAVINE,

Attorneys for Defendant.

Points and Authorities

I.

The case against Dr. Bloch turned upon the credibility of either R. S. Cantu, a government agent, or Dr. Bloch, whose testimony was directly in conflict with that of Cantu. Therefore, the credibility of Dr. Bloch was directly in issue for the jury to determine to decide which of the two—Cantu or Dr. Bloch—it would believe. To impair the credibility of Dr. Bloch, the government asked Dr. Bloch if he had been convicted of a felony, and he replied in the affirmative, although he had not put his character in issue and the question was be-

yond the scope of any question asked on direct examination.

The jury, based upon the testimony before it that the doctor was convicted of a felony, previously, and shadowing his credibility before it, brought in a conviction in the instant case.

However, on appeal, the United States Court of Appeals for the Ninth Circuit, reversed the judgment of conviction (221 Fed. 2d 786; 223 Fed. 2d 297), and thus the defendant stands convicted on a fact that should have been non-existent at the time, namely: That he was convicted of a felony, and a fact which could not have with reasonable diligence been known until after the Court of Appeals passed upon his appeal. Hence, the defendant is entitled to a new trial in the interest of justice within the meaning of Rule 33 of the Rules of Criminal Procedure since it could not have been known until after the Court of Appeals acted in the income tax case that he did not legally stand convicted of a felony, and therefore had a right to have his cause tried before a jury without the impairment of his credibility by the asking of this question and the placing of this finally undetermined fact before the jury.

The reason for receiving evidence of a prior conviction for felony is that one so convicted deserves less credit as a witness than one who has not been so convicted. Consequently, the jury believes that fact in passing upon the credibility of the witness.

The prosecutor, in asking the question and knowing the cause was on appeal, risked the danger that if the former conviction is reversed that a new trial should be granted in the case in which that prejudicial evidence is brought out, for the defendant suffers irreparable prejudice before the jury by the disclosure of the former conviction. In this case, the testimony as between the narcotic agent Cantu and the defendant involved the credibility of one or the other. Therefore, since the first conviction was reversed, a new trial should be granted in the present case to avoid an unjust conviction. (See Campbell v. United States, 176 Fed. 45, at page 47.)

II.

The use of evidence knowingly perjured violates the due process clause of the Fifth Amendment to the Constitution of the United States and makes judgments a nullity.

Mooney v. Holohan,
292 U. S. 103, 79 L. Ed. 791;

Hysler v. Florida,
315 U. S. 411, 86 L. Ed. 934.

In Hysler v. Florida, 315 U. S. 411, 86 L. Ed. 934, the Supreme Court said:

"If a state, whether by the active conduct or the connivance of the prosecution obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of the guilt or innocence and thereby deprives an accused of liberty

without due process of law. Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791."

A new trial may be granted where it appears that material testimony given at the trial was perjured.

United States v. Johnson,
149 Fed. 2d 31;

Martin v. United States,
17 Fed. 2d 973, Cert. denied, 275 U. S. 527,
72 L. Ed. 408.

Where the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it, or did not know of its falsity until after the trial, he should be granted a new trial.

United States v. Johnson,
149 Fed. 2d 31.

III.

Where there is evidence in the possession of the government which would aid the defendant, the government is duty bound to produce that evidence, since the government prosecutor represents all of the people and not merely one side.

Berger v. United States,
79 L. Ed. 1314, 295 U. S. 78.

The prosecutor had a duty to produce Gilbert Hernandez, who Cantu claimed was present during conversations between Cantu and the defendant regarding the purported getting of narcotics for

"girls" who were prostitutes, which testimony Gilbert Hernandez denies in affidavits and testimony before this court.

The wilful suppression of evidence favorable to the defendant violates due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. (See Smith v. O'Grady, 312 U. S. 329.)

Where the government is in possession and control of evidence which, if presented, might have materially influenced the jury to reach a different conclusion and fails to produce it and it is not available to the defense until after the trial, a new trial should be granted as such evidence is newly after the trial and is material (United States v. Smith, Fed. case No. 16341; Gichanov v. United States, 281 Fed. 125), and failure to produce it at the trial was not owing to want of diligence (Green & Moore Co. v. United States, 19 Fed. 2d 130; Silva v. United States, 38 Fed. 2d 465) and where the prosecutor did not produce it but rather prevented the defendant from being able to produce it at the trial, such procedure amounts to extrinsic fraud, for which a new trial is always proper. (U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93.)

DeLouis v. Meek,
2 Green (Iowa) 55, 50 Am. Dec. 491.

Smith v. Lowry,
1 Johns (N. Y.) 320.

In Bryant v. Stilwell, 24 Pa. 314, the court said:

> "To smother evidence is not much better than to fabricate it. A party who shuts the door upon a fair examination, and thus prevents a jury from learning material facts, must take the consequence of any honest indignation which his conduct may excite * * * It ought to be understood that where one party has the subject matter of the controversy under his exclusive control, it is never safe to refuse the witnesses on the other side an opportunity to examine it unless he is able to give a very satisfactory reason."

Even the Bible condemns conduct where it is declared "cursed be he that removeth his neighbor's landmark." (Deut. C. 27, 17.)

IV.

The evidence clearly shows that the defendant was entrapped. Hernandez was a government agent and became such during his treatment by the defendant. The introduction of Cantu was for the purpose of soliciting the acts charged. Such solicitation constitutes entrapment as a matter of law.

Sorrells v. United States,
287 U. S. 435;

Newman v. United States,
299 Fed. 128, 131;

Butts v. United States,
273 Fed. 35, 38.

A judgment is a nullity at any stage of the proceedings in which entrapment is established.

Sorrells v. United States,
287 U. S. 435.

/s/ MORRIS LAVINE,
Attorney for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT

State of Arizona,
County of Maricopa—ss.

Gilbert Ruiz Hernandez, being first duly sworn, upon oath, deposes and says:

That he is a citizen of the United States, and a resident of Phoenix, County of Maricopa, State of Arizona; that he has been a resident of such City, County and State for approximately ten (10) years.

That he has been addicted to the use of narcotics, and that as such an addict he became acquainted with the Federal Officers stationed at Phoenix, Maricopa County, Arizona; that among such officers were R. S. Cantu, Patrick Ross and George Dowell. That he became acquainted with R. S. Cantu some time during the year of 1952, having been introduced to him by Earl Smith, a narcotic agent located in Phoenix, Maricopa County, Arizona, now

deceased, and that thereafter he became acquainted with the other aforementioned Patrick Ross and George Dowell.

That all of said agents knew that he was addicted to the use of narcotics. That he has worked for said agents and that his compensation for his services rendered to them he has never been paid in money, except on one occasion; that all of his compensation has been in the form of narcotics, either Opium, Heroin, Dilaudide, Cocaine, or Morphine; that as compensation also his wife, to wit, Isabel Hernandez, has been given narcotics by R. S. Cantu; that during the course of his addiction he contacted Bernard Bloch, the defendant above named, relative to treatment for such addiction; that the said Bernard Bloch, did upon numerous occasions treat affiant by the administration of medication through the use of a hypodermic syringe, and did furnish to affiant medications to be self-administered.

That the aforementioned narcotic agents, to wit, R. S. Cantu, Patrick Ross and George Dowell, knew that affiant was being treated by the said Bernard Bloch.

That approximately two days prior to September 23, 1953, R. S. Cantu, one of the said and aforementioned narcotic agents, contacted affiant and requested that he go to the office of the said Bernard Bloch and obtain narcotics from the said Bernard Bloch. That at said time affiant was told by the said R. S. Cantu that in the event he failed to cooperate with the narcotic agents of the United

States Government that they would cause his probation to be revoked, and would cause him to be sent to Prison as a result of such revocation of probation. That affiant was on probation in the Superior Court of Maricopa County, State of Arizona, being under probation for a period of five (5) years as a result of Forgery; that affiant feared for his liberty as the result of said aforementioned threats on the part of said narcotic agents and, therefore, agreed to co-operate with the said narcotic agents.

That on the 23rd day of September, 1953, affiant was taken to the vicinity of the office of the said Bernard Bloch, by the said R. S. Cantu, and was told to get narcotics from the said Bernard Bloch. That the said R. S. Cantu furnished to affiant monies with which to obtain said narcotics, the exact amount of which, and the exact denomination being at this time not known to, nor remembered by affiant. That affiant did go to the said office of the said Bernard Bloch, and did request medication from the said Bernard Bloch, which said medication was given to affiant in accordance with previous practice. That the said Bernard Bloch, at said time and place did administer medication to affiant by means of a hypodermic syringe, and that affiant did take the balance of said medication with him and did give the same to the said R. S. Cantu; that thereafter affiant had conversation with the said R. S. Cantu, Patrick Ross and George Dowell, at which time affiant was told to introduce the said R. S. Cantu to the said Bernard Bloch as his

brother, Ray, and to tell the said Bernard Bloch that the said R. S. Cantu was addicted and was in need of medication of the same type which was being administered to affiant; that the said narcotic agents, R. S. Cantu, Patrick Ross and George Dowell, threatened affiant again, that if he failed to co-operate as aforementioned that they would cause his probation to be revoked, that affiant thereupon agreed to so do and on September 24, 1953, subsequent to a call being made by affiant to said Bernard Bloch, to ascertain his presence in his office, went to the office of the said Bernard Bloch with the said R. S. Cantu, and there did introduce the said R. S. Cantu, to the said Bernard Bloch, as his brother, Ray (Just arrived in Phoenix from California), and stated to the said Bernard Bloch that the said R. S. Cantu, allegedly brother of affiant, was addicted and in need of medication; that the said R. S. Cantu thereupon confirmed said statement by statements to the said Bernard Bloch, that such was a fact. That there was a conversation between affiant and the said Bernard Bloch concerning an outstanding bill owed to the said Bernard Bloch by affiant, and that affiant stated that his brother (Cantu) would pay some on said bill, which (Cantu) agreed to do. That there was stated by affiant to the said Bernard Bloch that affiant had received $20.00 from Cantu previous to the entry into the office of the said Bernard Bloch, which monies were paid to Bernard Bloch, and that Cantu, likewise, paid the said Bernard Bloch some further monies, the exact amount being by affiant not re-

membered and unknown. That affiant received a 10 cc. vial of narcotic from the said Bernard Bloch, and that thereupon affiant and Cantu left the said office of the said Bernard Bloch.

That at all times while affiant and Cantu were in the office of the said Bernard Bloch, the said R. S. Cantu was at no time out of the immediate presence of affiant; that at no time was there anything stated by the said R. S. Cantu to the said Bernard Bloch, or to anyone, that the said R. S. Cantu was a peddler of narcotics; at no time was anything stated that the said R. S. Cantu, by the said R. S. Cantu, or anyone else, that the said R. S. Cantu was in need of the said narcotics for girls who were in his employ, namely, prostitutes; that at no time was anything stated by the said R. S. Cantu, or anyone else, that narcotics were needed for any other person other than medication for himself and affiant. That thereafter affiant and the said R. S. Cantu left the office of the said Bernard Bloch, and met officers Patrick Ross and George Dowell, who were awaiting the return of affiant and the said R. S. Cantu, at which time and place there was given to affiant some several cc.'s of the said narcotic obtained from the said Bernard Bloch, the exact quantity being to the affiant unknown; the remainder of said narcotic being retained by said narcotic agents.

That shortly before the trial of the above-entitled matter in the above-entitled court, which said trial took place during the 25th, 26th and 27th of May,

1954, the exact date being not remembered by affiant. affiant was contacted by the Federal Narcotics Agents hereinbefore named, to wit, Patrick Ross. George Dowell and R. S. Cantu, together with Dale Welsh, a member of the City Police Department of the City of Phoenix, Arizona, concerning the fact that one Wade Church, a practicing attorney in Phoenix, Maricopa County, Arizona, then representing the above-named said Bernard Bloch, during the said trial, was attempting to contact affiant and that affiant was told by said Officers to avoid the said Wade Church and not to tell him anything concerning the facts of the case which the Federal Government had against the said Bernard Bloch. That thereafter the said narcotic agents again contacted affiant and told him to call the said Wade Church, and to arrange a place with him where affiant could talk to the said Wade Church, then affiant was told to inform the said Wade Church to meet him at a predesignated place at 25th Avenue and Jefferson Street, in the City of Phoenix, Maricopa County, Arizona, and from there to take him to the Plaza Apts Motel at 2511 West Van Buren Street, Phoenix, Maricopa County, Arizona, and to represent to the said Wade Church that affiant was living in said motel, Apartment 4; that affiant was told to take clothes to said Apartment 4 so that the said Wade Church would believe that he was living at said apartment; that affiant was with the said aforementioned narcotic agents and the said Dale Welsh and Bert Dobbs, another Federal Narcotic Agent, when the said Apartment 4,

in the above-mentioned motel, was wired for recording; that affiant was told that agents and officers aforementioned would be in Apartment 3 with recording equipment. That affiant did meet the said Wade Church at the corner of 25th Avenue and Jefferson Street, by prearrangement, at which time the said Wade Church requested affiant to go to his office to discuss the case against the said Bernard Bloch, that because of previous instructions given to affiant by the said Officers, affiant insisted that he would not discuss anything unless at his motel, to wit, Apartment 4, Plaza Apts Motel, as aforementioned, that the said Wade Church thereupon agreed to take affiant to the said apartment and that affiant and the said Wade Church did go to said apartment. That affiant had been previously instructed by the said aforementioned Federal Narcotic Agents and the said Police Officer Dale Welsh, not to disclose to the said Wade Church any matters concerning the evidence of the Government of the United States against the said Bernard Bloch, but instead to attempt to question the said Wade Church in such a manner so that the said Wade Church would be enticed to offer affiant a bribe for the production of testimony by affiant in behalf of the above-mentioned Bernard Bloch; that the said Wade Church did request that affiant discuss the facts of the case with him, but that as per previous instructions from the said aforementioned officers, affiant refused to disclose to the said Wade Church any of the facts concerning the evidence against the said Bernard Bloch, and stated to the said Wade Church

that he did not desire to become any more involved in the case than he already was and attempted to have the said Wade Church offer to him a bribe for his testimony, which the said Wade Church never did. That after conversation was had concerning the case against the said Bernard Bloch, and after affiant refused to divulge any information to the said Wade Church by reason of his previous instructions, the meeting between the said Wade Church and affiant broke up and the said Wade Church thereafter left affiant at the said motel, Apartment 4; that thereafter the Federal Officers expressed their disgust with affiant for his inability to entrap the said Wade Church.

That during the course of the trial of the said case against the said Bernard Bloch, affiant was secreted in a room in the Federal Building in the City of Phoenix, Maricopa County, Arizona, and instructed not to discuss the case with any person. That affiant was subpoenaed by the Government of the United States to testify at the trial of the above-named Bernard Bloch, but that affiant was not called as a witness in behalf of the Government of the United States, nor was he called as a witness at all in said matter.

That the above-named Bernard Bloch, did not know until subsequent to the trial and subsequent to his conviction what the testimony of affiant would have been had he been called as a witness either by the Government of the United States, or by the defendant Bernard Bloch; that the said Bernard

Bloch did not know of said evidence by reason of the fact that affiant refused to divulge any of said matters to the said Wade Church, by reason of instructions given to affiant under threat of revocation of probation.

That on many occasions from and after the introduction of the said R. S. Cantu to the said Bernard Bloch by affiant, the said Federal Officers threatened affiant and told him to leave Phoenix on many occasions giving affiant and his wife sufficient narcotics to dispel withdrawal symptoms while riding on the bus from Phoenix, stating that the said Bernard Bloch had employed some man with a gun to "get" (Affiant) by reason of his participation in the case against the said Bernard Bloch; that affiant would take the narcotics offered himself and his wife, and would go to the Bus Depot with the said narcotic agents, but would not leave upon the buses indicated for their departure.

/s/ GILBERT RUIZ HERNANDEZ.

Subscribed and sworn to before me this 1st day of February, 1956.

[Seal] /s/ R. N. RENAUD,
Notary Public.

My Commission Expires: 3-15-58.

[Title of District Court and Cause.]

AFFIDAVIT

Maricopa County,
State of Arizona—ss.

Wade Church, Attorney-at-Law, of Phoenix, Arizona, being first duly sworn, deposes and says:

That shortly before the trial of the above-entitled case in the district court (which trial took place on May 25th, 26th and 27th, 1954), I tried to secure a statement from one Gilbert Hernandez. After several attempts were made to locate him, I finally reached him by phone. I asked him to come to the office, or let me come to his home for the purpose. He said he did not want to come to the office, and that since his wife did not know of his troubles, he did not want to meet at his home. He said he would call and let me know where he would meet with me. He called me back and suggested that I meet him at the corner of 25th Avenue and Jefferson Street in Phoenix, Arizona. This I did. He took me to Apartment No. 4 at the Plaza Apartment Motel, located at 25th Avenue and Van Buren Streets in Phoenix, Arizona. I asked him why we were meeting here and he said that it was the room of a friend who let him use the room when he was tired. I tried to get data from him regarding this case, but he kept insisting that he ought to have something from Dr. Bloch or me for his efforts. I explained that any statement that he made would have to be voluntary and that he was promised nothing by either Dr.

Bloch or myself. He would not tell me anything about the case, unless he was paid or rewarded and so my mission proved a failure.

/s/ WADE CHURCH.

Subscribed and sworn to before me this 8th day of February, 1956.

[Seal] /s/ SADIE S. HOBBS,
Notary Public.

My Commission Expires: 1/5/59.

Receipt of copy acknowledged.

[Endorsed]: Filed February 9, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF BERNARD BLOCH

State of Arizona,
County of Maricopa—ss.

Dr. Bernard Bloch, being first duly sworn, deposes and says:

I am a licensed osteopathic physician and surgeon, licensed under the laws of the State of Arizona, and have practiced my profession at Sunnyslope, Arizona. I am a graduate of the osteopathic medical school of Chicago and subsequently had considerable hospital training and experience in my field. At the times mentioned in this affidavit, I

was duly registered as required by law and the holder of a government narcotics license.

In 1953, pursuant to the laws of the state of Arizona, I was treating a patient named Gilbert Hernandez for narcotic addiction, as permitted by the laws of my state and of the United States. I was giving him a known and accepted form of treatment, a diluted form of morphine and atropine.

I am informed and believe, and therefore allege, that Hernandez was approached by officers of the Narcotics Bureau of the United States in 1953; these officers being Pat Ross and R. S. Cantu, and that they asked that Hernandez make a case against me and promised to give him additional narcotics if he did so and would supply him with all of the narcotics that he needed, but that if he did not do so that they would arrest and put him away for a long time in jail or prison.

Hernandez was at the time on probation in the Federal Court. I am informed and believe, and therefore allege, that he was given narcotics by these narcotic agents, such narcotics not being secured in any regular manner and that such narcotics were supplied in violation of the Federal Narcotic Law itself, and from narcotics obtained from illegal sources. I am further informed and believe that neither Pat Ross or R. S. Cantu held a license or hold a license to dispense narcotics and that such giving of narcotics by such officers is not permitted by law and that narcotics may only be dispensed

with upon and by proper medical authority or upon a doctor's prescription.

I am further informed and believe that a probation officer warned these narcotics agents not to use Hernandez for the entrapment or arrest of any person.

I am further informed and believe and therefore allege that Hernandez was thereafter given pure opium and heroin by these narcotic agents in order to bring about my arrest and conviction on a charge of violating the federal narcotic laws.

I am informed and believe and therefore allege that Hernandez then became a secret and confidential agent for the United States Government for the purpose of trying to bring about my arrest and conviction on the charge of violating the narcotic laws of the United States; that he was contacted by Agent R. S. Cantu, a regular and so-called undercover agent for the Narcotic Bureau.

On September 24, 1953, my patient, Gilbert Hernandez, who had now been employed secretly by the Narcotic Bureau of the United States Government, brought Special Agent R. S. Cantu to my office and Hernandez introduced Mr. Cantu to me as his brother addict, who needed treatment for his addiction just as he, Hernandez, was receiving. Hernandez introduced Cantu as his brother, Raymond. I am informed and believe, and therefore allege, that the agent of the United States Government Cantu and Agent Ross had told Hernandez to do

this. Cantu represented that he was an addict, saying, in substance and effect, "I am an addict. I need treatment, too." Mr. Cantu told me he was a sick man and needed treatment. Mr. Cantu did have the appearance of an addict and I am informed and believe, and therefore allege, that he did use narcotics himself.

I am informed and believe from affidavits of Mr. Hernandez that Cantu has given Hernandez illegally as much as ten to fifteen grains of heroin, morphine and opium at a time, and that Mr. Cantu has taken various narcotics and has smoked marijuana with different people, and has injected himself with heroin.

At no time did Mr. Cantu tell me that he wanted any narcotics for any other persons than for his own addiction. At the time that he came and told me that he was an addict and wanted the narcotics for his own addiction. He was accompanied by Gilbert Hernandez, and at that time he made no statement that he wanted the narcotics for any other person or purpose.

During the trial of the case Mr. Cantu testified as follows:

"Q. Did Hernandez tell Dr. Block that you were in need of treatment?

"A. No, he told defendant Bloch that my girls needed treatment.

"Q. Your girls? A. That is correct.

"Q. What do you mean, your girls?

"A. I had several girls working in the resorts here.

"Q. Did you actually have any girls working in resorts? A. Certainly not.

"Q. In other words, you represented, you were stating that you represented to Dr. Block that you had some girls working in resorts?

"A. That is correct.

"Q. What kind of girls were they? Did you tell him? A. Prostitutes.

"Q. You told him they were prostitutes?

"A. That is correct.

"Q. And you told him they were working for you? A. That is right.

"Q. And you told him they needed this particular type of treatment? A. That is right.

"Q. Did you tell him that these so-called prostitutes were addicts? A. That is correct.

"Q. You told him they were addicts?

"A. That is correct.

"Q. And you told him they needed treatment for this addiction? A. That is right."

The foregoing testimony was false and was known to Cantu to be false. No such statements were made to me. Hernandez, though subpoenaed by the government, was not called as a witness. I am informed and believe, and based upon an affidavit of Hernandez alleged that he was told not to make any statements or give any information to my lawyers or to me, and he was told not to be available for any statements or to say anything. I am informed and

believe and therefore allege that Hernandez, who was present at all times that Cantu talked to me, would have testified that Cantu made no such statements to me.

That subsequent to the trial Hernandez revealed the fact that he had been instructed during the trial not to talk to anyone and not to inform anyone what the facts were. That his evidence contradicting Cantu and corroborating me that Cantu never made representations that he wanted the narcotics for prostitutes was vital in my defense and was knowingly and wilfully suppressed through agents of the government, in violation of my constitutional rights to a fair trial under the due process clause of the Fifth Amendment to the Constitution of the United States.

/s/ BERNARD BLOCH.

Subscribed and sworn to before me this 7th day of February, 1954.

[Seal] /s/ MARGARET DODDS,
Notary Public in and for Said County and State.

[Endorsed]: Filed February 10, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
District of Arizona—ss.

I, Robert S. Murlless, being hereunto duly authorized, of my own knowledge, upon my oath, depose and say:

Gilbert Hernandez was not secreted nor sequestered during trial as alleged in paragraph .... on page six of his affidavit filed in support of motion for new trial. I observed Gilbert Hernandez in open court on one of trial days during trial of this cause.

/s/ ROBERT S. MURLLESS.

Subscribed and sworn to before me this 13th day of February, 1956.

[Seal] /s/ WM. H. LOVELESS,
Clerk of the United States
District Court.

[Endorsed]: Filed February 13, 1956.

[Title of District Court and Cause.]

MINUTE ENTRY OF
MONDAY, FEBRUARY 13, 1956

The Mandate of United States Court of Appeals comes on regularly this day for approval and Defendant's Motion for New Trial, filed February 9,

1956, is called for hearing. Robert S. Murlless, Esq., Assistant United States Attorney, is present for the Government. The defendant is present in person with his counsel, Morris Lavine, Esq., and Robert Renaud, Esq.

Counsel for the Government moves that the Mandate be approved and spread on the minutes. Said motion is resisted by counsel for the defendant.

Defendant's Motion for New Trial is argued and submitted.

It Is Ordered that Defendant's Motion for New Trial is denied, and that the Mandate of the United States Court of Appeals be and it is approved. and that the same be spread upon the minutes.

Counsel for the defendant moves for order fixing bail pending appeal.

It Is Ordered that said motion for Bail Pending Appeal is denied.

Counsel for the Government moves that defendant be remanded to the custody of the Marshal.

It Is Ordered that the defendant be and he is committed to the custody of the United States Marshal for execution of the judgment and sentence imposed on July 6, 1954, and that the defendant's bail bond pending appeal heretofore, filed on July 6, 1954, is exonerated.

(Docketed Feb. 13, 1956.)

C-12340 Phx.

United States of America—ss.

The President of the United States of America

To the Honorable, the Judges of the United States District Court for the District of Arizona, Greeting:

Whereas, lately in the United States District Court for the District of Arizona, before you or some of you, in a cause between United States of America, Plaintiff, and Bernard Bloch, Defendant, No. C-12340 Phx., a Judgment was duly filed on the 6th day of July, 1954; which said Judgment is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof,

And Whereas, the said Bernard Bloch appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 23rd day of September, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for

the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(October 12, 1955.)

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the twenty-third day of January in the year of our Lord one thousand nine hundred and fifty-six.

/s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed February 13, 1956.

[Title of District Court and Cause.]

ORDER DENYING BAIL

A motion having been duly made on February 13, 1956, for bail pending appeal from the order denying a new trial and refusing to vacate the judgments

on Counts I, II, IV, V, VII and VIII, entered on May 27, 1954, and the court having doubt as to his authority to grant the motion for a new trial at this time, the court denies the application for bail pending appeal.

Dated this 13th day of February, 1956.

/s/ DAVE W. LING,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Offense: Violation of Title 26 U.S.C. 2554(a). Sale of narcotics not pursuant to written order form and not pursuant to lawful business nor legitimate practice of profession (six counts).

Verdict of guilty as to Counts I, II, IV, V, VII and VIII on May 27, 1954, and Judgment of Conviction entered on May 27, 1954.

Order denying Motion for New Trial February 13, 1956, under Rule 33, Rules of Criminal Procedure, after return of mandate.

Judgment of two years' sentence made and entered July 6, 1954.

The above-named Appellant does hereby appeal to the United States Court of Appeals for the Ninth

Circuit, from the above-stated judgments and orders.

Dated this 13th day of February, 1956.

MORRIS LAVINE,

/s/ MORRIS LAVINE,

McKESSON & RENAUD,

By /s/ ROBERT H. RENAUD,
Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 13, 1956.

In the United States District Court for the District of Arizona

No. C-12,340 Phoenix

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BERNARD BLOCH,
Defendant.

Thursday, May 27, 1954—Ten o'Clock A.M.

Before: Honorable Dave W. Ling, Judge, and a Jury.

PROCEEDINGS

The Court: You may proceed with your arguments.

OPENING ARGUMENT FOR PLAINTIFF

By Mr. Murlless:

If your Honor please, counsel for the Defendant, ladies and gentlemen.

This matter has taken some two days already, and it is not my purpose to thrash out every word that was said again. It would take too long, and it is not, in my humble opinion, it is not an economical use of your time.

As a matter of fact, I don't know which part of the case isn't pretty obvious, but it comes the time in the trial when opportunity is given to what they call argue the matter, and I shall take to some degree a short period of your time for my turn.

It is not so much argument, it was not my estate, if you will recall, in the opening statement, to start with an argument either. It may be the most significant thing that was said at that time, was this: I have here a copy of the indictment, a copy of the original that is on file. If you will recall, we went non sequitur, it seemed like it was kind of a fruitless thing. The Clerk had already read the nomination of the case, the name of the case, and we talked about [2*] it again very briefly.

It reads, if you will notice, United States of America versus Bernard Bloch. It is not United States of America versus Gilbert Hernandez. It is not United States of America versus Renaldo S. Cantu. It is not against Pat Ross, not against anybody except Bernard Bloch.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

And it has been that kind of a dust storm, one or the other of that kind of a dust storm that has taken your time, most of your time for two full days.

And it started right away in the opening statement that followed mine. The dust clouds were begun to be stored up, and most of our time has been waiting for the dust to settle, and to settle the clouds, and confusion has been generated, and to let it settle out so we could see what happened. And when you look at what generally was testified to, as I say, I have only my own opinion. It seems like what happened in this case, however, is pretty obvious.

And then we talked about each one of the allegations of the indictment, and it was pretty dry talk. It was not very much of a display. It didn't sound very smart, and it didn't make, it was a series of things, like there was a sale of narcotic drugs not in the course of a medical practice, not pursuant to a [3] treasury form, a form provided by the Secretary of the Treasury for the person to whom such drugs can be sold, or may be sold under law.

It was not pursuant to a prescription, and it happened the first time, if you will recall, we went through the September 24th, the 29th day of October, the 30th day of October, the 16th day of November, and the 19th day of November, all of 1953, and it didn't sound, it didn't make much difference anyway.

The most important part was, the case legend has

been, even when the dust clouds were being stirred up, it was United States of America versus Bernard Bloch, and they endeavored to try everybody else.

Now this morning for just a short time, let us try just this one case. You are not expected to try three or four all under one charge, just the one case, United States of America versus Bernard Bloch.

I said, it seems to me pretty obvious what happened. When all of the smoke is cleared away, and the dust is settling, and the underbrush cut away from it, there is not much in issue here. But they do raise an issue. They have endeavored to show a defense. And what is it?

It is not my purpose to confuse. It is to cut all that that is not necessary, all that that was [4] just to confuse things, away from it.

What is it? In simplest terms, what they have tried to show is that these—I shouldn't say all of them, because they deny, of course, that some of them were ever sold, but the first one mentioned in the indictment, which is Government's Exhibit 4-A in evidence, and the last of the narcotic exhibits, which is Government's Exhibit 9-A in evidence, those are the ones they admit were sold.

They say we didn't do anything else, but these were sold in the course of a medical practice.

"In the course of medical practice." The Government contends, I urge you, that the evidence that you can believe from the stand here has shown that even these weren't connected reasonably, within reason, to a professional medical practice.

Look at them. First thing, look at them. And this bothered the Defendant on the stand, that they did not look to be.

The only sticker they have on exhibit 9-A is one obviously that the government agents put on there to identify it.

Look at 9-A. What does it contain? Everything that the government agents have put there, and what you observed put there this morning. Forget about [5] the record that was made. What is that?

The admission is it is a deadly poison, or two of them. That is what it contained, is two deadly poisons.

It looks like water in a non-labeled bottle. Deadly. They say it is deadly.

Does it look like it came out of the regular course of a medical practice? Not labeled. Not anything.

Look at Exhibit 4-A. This is the one that was a dirty bottle in the first place. It stinks. Is there anything about that that looks like the course of a medical practice?

The government agent put that there, and that is where his initials were. And you see how carefully government agents handle this stuff, and how it gets identified time and time again, and how it takes a bundle of paper—this was done with respect to Government's Exhibit 3 in evidence. It takes a bundle of paper to get one of them in evidence. They wrap it in paper and put it in an envelope that it takes him minutes to get it out of.

It is dangerous stuff. They don't deny it. A deadly poison, they say, mixed with another deadly

poison, and they handle it, and it is handled in a [6] manner that looks like water. And they say "in the course of a professional medical practice."

It is not. I leave it to you ladies and gentlemen. If it is in the course of anything, it is in the course of the narcotics traffic.

And what do they say about Government's Exhibit 9-A there, and I don't mean to misquote or misstate. Particularly, I think it is 9-A that contains —the testimony was it contains 30 cc., and rather than misquote it—I am wrong, it contains 20 cc., the testimony from Mr. Hubach was. This is 20 cc.

Defendant stated that he got 30 cc. of morphine sulphate and atropine solution, 30 cc. for about a dollar. And what he sold it for, 9-A, was $50. Fifty dollars. Bought it for—this is two-thirds of what he could purchase for a dollar. Sold it for $50.

In the course of a medical practice? I say to you, ladies and gentlemen, no. In the course of the narcotic traffic.

What does it look like? It doesn't look like a doctor's medicine bottle to me. It looks like it has got water in it. No identification. It took all this paper and all the time of these agents to show you what is in that exhibit, that Government's Exhibit 9-A.

Those are the ones he admits. He says the [7] others are a mistake. He didn't do it, didn't have anything to do with it.

And the first one was Government's Exhibit 3, which isn't in the indictment. It was that which occurred the day before the first allegation here. The first allegation here is that of the 24th day of

September, 1953. It is not here. This is the first one, Government's Exhibit 4-A, is the one that was handled on the 24th of September, that they admit was.

5-A, 6-A, 7-A and 8-A. One of them, ladies and gentlemen, with an identifying label on it. One of them labeled, with an identifying label on it, one of them.

Government's Exhibit 6-A. One of them with an identifying label on it. This is the one, too, which could be concretely identified by its own self. You could show what it was on the outside of it, and what doctor said that this was a treatment, a good treatment for narcotic addiction? None of them. It is not. None of them. And there is one that is missing there.

We had a lot of talk about morphine mixed with atropine, as one counteracts the other, so they don't satisfy a narcotic's desires. But there is one that is not morphine sulphate and atropine combined. And what is it? [8]

Dilaudid. One of the most powerful of the drugs. C. E. Hubach says, just like morphine, a derivative of opium, and within the violation that is described in hundreds of pages of Title Twenty-six, United States Code, dedicated to the control of the vicious deadly traffic in narcotic drugs. Dilaudid. I don't say he didn't have an explanation for this. He almost had an explanation for everything, almost for everything.

This, he didn't buy it from me. They took it off my shelf the day eight agents were out there and

swarmed all over the place. A number of people went through my cabinets, went through my office, all over the place. They didn't find a card, obviously, that would, or they urge now will explain everything.

I asked him about it again later. He didn't know about it then either.

Look at Defendant's Exhibit B. It looks like it was written all at the same time, just like Mrs. Woods.

I felt sorry for her, the nurse that made the entries. She was told what to say, just like she had to say it, and she admitted, yes, it looks to me like all of the entries in Defendant's Exhibit B in evidence that read "Raymond Portillo, or Portillo, by Raymond, [9] were made in the same color ink. You look at them, ladies and gentlemen. They are only a different shade of the color right above them, but you look at each one of them. That is right, they are.

All of them are made at the bottom of the column in which they appear, concidentally made in just a little different color ink than those above. All of them made in a place where they could have been made at a different time than what they represent.

All of them, the only entry of its kind, that is, one person paying for another. The only entry of its kind in the book, those four, all with respect to the same two names.

It is almost endless, the reiteration that I could go ahead with, and I am like you, I think enough

is enough, when it is clear, and when the dust is settled, and it is plain that we should stop the argument and stop the talk.

It doesn't look like the medical practice to me. It looks like the narcotics traffic.

Look at them, ladies and gentlemen.

ARGUMENT FOR DEFENDANT

By Mr. Church:

Your Honor, ladies and gentlemen of [10] the jury, Mr. Murlless.

Counsel for the Defendant has started out saying that there had been a tremendous dust storm created to try to becloud these issues. He said the dust storm was created by a Mr. Cantu, and a Mr. Hernandez, both of whom are paid agents in their employ, by all of the uncontested testimony in this particular case.

If there is any dust storm stirred up by those two men, it certainly isn't the fault of the defendant. Those are the paid employees of the Government that have stirred up the storm.

Now, our purpose at this time, and I do want to take a little of your time, because this is a deadly serious thing. It is a very serious and heinous crime that is charged against my client.

At this time, you are probably in the position of working on a jigsaw puzzle, where you have lots of bits of evidence in different shapes and yet they aren't related or put together so you can see what

the total picture is, and how the facts are related to the law in this particular case.

You have been reminded, and you will be reminded again, that you are the sole judges of the facts, what happened and the credibility of the witnesses. [11]

You watch the witnesses. You determine whether in your opinion you think they are telling the truth. You are the sole judges.

The judge will instruct you with reference to the law, and how you apply the law to this particular case.

I must remined you again that this is a criminal trial. Now, in a civil trial, you only have to prove by a preponderance of the evidence each of the material allegations made, but in this case, a criminal case where the consequences are so great, the government must prove beyond a reasonable doubt every one of the material allegations that are set out in their charges which he read to you.

Now, let us look for a moment at these charges.

In the first place, I want to point out, as you no doubt heard when this trial opened, that count III and count VI charged Dr. Bloch with unlawfully, unduly and feloniously obtaining certain narcotic drugs by means of order forms, and so forth. Those two charges were dismissed at the instance of the government, because they couldn't prove them.

So, therefore, the Court will instruct you that counts III and VI are out. [12]

In other words, there is no evidence even by the admission of the government that any of these drugs

were obtained either from retail, wholesale sources, or in any other manner, in an illegal manner. They, by their own stipulation before you, they stated there is no question about that, and they have asked for a dismissal of those two counts, and they were dismissed.

Now, let us look at the wording of this charge, and all of these counts read the same.

That Dr. Bernard Bloch on a certain date, the dates which you have heard, did knowingly, willingly, fraudulently, and feloniously sell to one agent, or one R. S. Cantu a certain quantity of narcotics here.

Now, I want to be perfectly honest with you folks. I don't think that Mr. Murlless made a fair statement in his own behalf with reference to these particular exhibits. We didn't deny giving any of those, with the exception of these two dilaudid tablets, which we stated were taken out of the car by an agent.

Now, Mr. Murlless says there is only two. I want to be perfectly fair with him. We admit that all of those were given in the ordinary course of Dr. Bloch's practice to a person whom he thought was a patient.

Let us get the record straight, and let us be fair about this. We admit all of them were given, with [13] the exception of these two dilaudid tablets, and may I point out in that connection that the government has never shown what the quantity of dilaudid is in those tablets. They could be absolutely harmless.

With reference to the morphine, they pointed out the quantity, a quarter grain, a sixteenth of a grain, an eighth, and so forth.

That is the only way you can tell whether or not they are dangerous.

Now, the government has to prove beyond any reasonable doubt in the minds of any one of you jurors that Dr. Bloch knowingly, willfully, fraudulently, and feloniously sold these drugs to one R. S. Cantu, and not in the course of a professional practice as a physician, and not to one whom he believed to be a patient.

Now, a doctor can prescribe. They are giving an acutal prescription if they do it in good faith, and in the ordinary course of practice.

The Judge will so instruct. There is nothing wrong with that. That has to be. That is what a doctor's business is, and if he does it in good faith, and if he does it in the course of his ordinary practice, then he is guilty of no crime whatsoever, and you will have the instruction of the Court with reference to that.

Now, all these counts are similarly worded, [14] and the only difference in the counts is a breakdown to show different transactions over a period of time.

Now, what is the evidence, ladies and gentlemen? According to Mr. Ross, whom you heard testify, who is the head of the Phoenix Narcotics Bureau, Dr. Bloch had been under the closest scrutiny, under investigation by their Narcotics Division for nearly three years. They had one Hernandez who was being

treated regularly by the doctor, and in their employ, and pay of the Government, who was receiving regular treatment from Dr. Bloch for nearly three years.

Now, you can imagine at the use of a man like Cantu the methods that were used. How many Cantus, who knows. But we do know by their own statements that they tried for nearly three solid years to find one violation of the Narcotics Act by Dr. Bloch, and they couldn't find one with reference to any of those patients.

They used all the methods that the Government has, which are many and devious and competent, and I think they should have those resources at their command, but they tried for nearly three years to find one patient that Dr. Bloch had treated improperly with reference to narcotics.

Mr. Ross says even his predecessor Smith, who [15] was the head of the Bureau, had him under investigation. Mr. Smith died in the service, but when he died, as a result of his investigations, there was not one iota, or one instance that the Government could point out where Dr. Bloch had violated the provisions of the Narcotic Act.

Now, think of what this means. The evidence is uncontroverted that Dr. Bloch sees between 25 and 30 patients a day. His book will show that that is almost 9,000 consultations, not all the same patients, in a year. Over a period of three years, it would be over 25,000, and yet in all of this time the Government by their own admission had him under obser-

vation trying to find out through Hernandez, yes, a known narcotic addict being treated by Dr. Bloch, and Hernandez, you can imagine, in every way possible trying to get a little extra drugs here, a little extra drugs there, naturally they are trying to find out whether he is violating, but try as they would, for nearly three solid years, there was nothing. I wonder if any of us were under investigation for three solid years, such as that by a very competent government service, one of the most competent, I am wondering if we could make as good a record as Dr. Bloch made.

And then what did they do? They finally [16] found out that they couldn't find it on a patient, so they put a plant in there in the name of one Cantu.

Now, let us look for a moment at the story of Mr. Cantu. He comes into the office of Dr. Bloch with a man by the name of Hernandez, who purports to be his brother.

Now, in fairness to Mr. Cantu, he said that he didn't say or tell Dr. Bloch that he was his brother, but he did say that Hernandez told him he was his brother, in his presence. He never said anything, so he led him to believe that he was his brother, this brother of the known addict, and addict that the Government knew was an addict, and an addict in the employ of the Government trying to get a violation.

So he introduces himself or leads Dr. Bloch to believe that he is the brother. The testimony is of his secretary that he did tell him he was his brother.

He said that Hernandez stated he was his brother,

and he didn't say anything, so I think it can be assumed that he posed as his brother.

Now, there is some question as to what else he posed as. I don't think that makes any difference. I don't think it makes any difference, as the paper said today. I am sorry to see some of the things tried in the paper, as to whether or not he would make a great [17] actor, or anything like that. That isn't important, because it is too serious for any levity such as that.

He said himself that he had three prostitutes that wanted the drug, because they were addicts.

Dr. Bloch states that he presented himself and showed the very symptoms of a narcotic addict, and Dr. Bloch states that in good faith he treated this man, thinking he was a patient.

Now, there is a conflict in the testimony. I am wondering if you noticed, any you are the judges of the facts, did you notice when Mr. Cantu was on the stand, I couldn't help but notice, he sniffled every once in a while, and he pulled his handkerchief out and wiped his hands, which is one of the symptoms, as the doctor said, the clammy hands, the sniffling. You know, when you do a thing so long, it almost becomes part of your subconscious. And I was very interested. I don't know how many of you saw that or not, but the statement of Dr. Bloch's testimony is that he complained of these stomach cramps, that he presented this evidence of sniffling that a known addict presents. You will note the testimony of Mrs. Woods, the secretary, that he was nervous, he changed from one chair to the

other, and he appeared to be nervous and agitated, as an addict would be. [18]

Now, I am going to give Mr. Cantu full credit for being a fine actor. I am telling you this, he wouldn't stay in the employ of the Federal Government as an undercover agent for very long unless he was a fine actor. He couldn't do it unless he was a fine actor, so he could pretend he was an addict and get something he shouldn't get.

I don't know whether he represented himself as a great lover boy, and all that business. I don't think it makes any difference in this particular case.

Here we have a man of the name of Hernandez, David, and incidentally, David Hernandez is a known addict. The testimony shows he is known by the name of Portillo. He also goes by the name of Yung. And I don't know how you feel about it, but I am always suspicious of a person that goes under a number of names. He is usually trying to hide something, unless it is legally changed, of course. But when a person goes under two or three types of names, it is for the purpose of deception, what kind of deception we don't know. In this particular case, I think we do, to attempt to secure something on the particular doctor.

Now, I want to point out with reference to Hernandez, now, this is David Portillo Hernandez, who was a known addict, and was treated by the doctor. The [19] evidence shows he did owe a doctor bill. He didn't pay the bill, and he was charged over two or three years that he was treated, and he built up a bill, and he didn't pay the bill.

Another thing, Dr. Bloch testified, and it is uncontroverted, that David Hernandez got the same kind of treatment, the morphine-atropine treatment that was given to Mr. Cantu.

The Government knew about this treatment of Hernandez. They had been watching him. He is in their pay. They have condoned this treatment all along as a treatment, as the prosecutor has suggested, instead of a treat. They knew that this type of medication was given to the known addict. They didn't disapprove, and yet they take the same kind of treatment and try to make a federal case out of it.

Now, apparently the Government just grew weary of trying to find Dr. Bloch in any slip-up with reference to any narcotics, so they did put Mr. Cantu in the picture.

Now, he also, you notice, did what a fellow who is doing his job in that particular connection should do. I am not quarreling with him. He tried to get other things. He tried to get dilaudid, but you notice with reference to dilaudid, every time he tried [20] to get that, did you notice he never ordered it, he never got them. The only thing he got were these.

(Indicating exhibits.)

Now, he says, the distinguished prosecutor here says that he bought something for a dollar and sold it for fifty dollars. I think the testimony is apparently uncontroverted, insofar as I can remember —maybe you can remember better than I can—that this money was applied on these particular bills of the man that already owed the doctor money. You

heard the testimony of Dr. Meyers, who was the very experienced man in this field, as to the type of money that is charged for the treatment of a narcotic addict, $1,000 to $2,500.

A professional man doesn't sell merchandise. He sells his time, and that time is very valuable. As the doctor said, I think it was $30 to $35 an hour, something like that. That is what a professional man has to sell. He is not selling merchandise. I mean, the fact he paid one dollar for it, he is selling his knowledge and his experience and his time. That is all he has to sell. A doctor and lawyer.

Now, you will note that each time Mr. Cantu spoke of receiving any of these exhibits, he always referred to it as medicine. You notice that he always [21] said he asked Dr. Bloch for some more medicine. Medicine. Well, medicine connotes a treatment, not anything that would satisfy the craving of a known addict. He by his own phraseology says that he was after medicine.

Now, I was very surprised. Let us look at what was given when Mr. Murlless said no doctor said it was a treatment.

Both doctors said it was a treatment. I went over one by one with Dr. Myers, and then his own doctor said yes, that would be a treatment, and I asked him, now, the presence of atropine in a solution such as this, I put the question directly to him, and they both said it was a treatment, yes, that would be a treatment.

And the presence of atropine is an element, as is

testified, and, incidentally, I mean when we come in here and talk about these as being water, or something like that, well, laymen don't know what are in these particular bottles. That is why we have to have the expert witnesses, and doctors, and chemists to tell us what that was. That might be a particular type of atomic energy that might be devastating. How do we know? That is why we have the expert witnesses, and the expert witnesses said these were treatments, that all these, even if taken all at once, couldn't [22] satisfy the craving of an addict.

Mr. Ross says it takes one and one-half to two and one-half grains a day to satisfy an addict. On the average here, over the 56 days that Mr. Cantu secured this particular medication, is averaged 1/16th of a grain, if he took them gradually, 1/16th of a grain a day over the 56-day period, and then it had the presence of atropine, which both doctors said was a method of treatment.

Now, as a matter of fairness, the doctor says it might have been a clinical mistake. Both doctors believe, and I think they are probably right, that he should put an addict in the hospital. But you know most of us are plain folks. We can't raise $1,000 to $2,500 for treatment.

I don't believe there are any methods of treatment, even in the Veterans Administration, for addicts, according to the testimony there, and that a thousand to $2,500, as was evidenced or brought out on the witness stand, is only for the medical bill. You have to pay the hospital bill too.

Yes, it would be a very desirable thing to hos-

pitalize people, and Dr. Bloch said he intended to hospitalize this man, suggested that he go to the hospital. [23]

Now, in fairness to Mr. Cantu, he denied that. That is a question of who to believe on that particular set-up.

Sure, it might have been a clinical mistake, but if a doctor—I mean a clinical mistake in that he didn't send him to the hospital, but if a doctor in the ordinary course of his practice, if he is dealing with one whom he thinks is a patient, has a right to prescribe a given medication, whether it is labeled or not labeled, for that particular ailment, or to relieve suffering, and the Judge will so instruct you when it comes time for that.

David Hernandez strikes me as a very interesting person. David Hernandez was an employee of the Federal Government, treated by Dr. Bloch for nearly two years. I wonder why they didn't bring him to the stand. He could have explained, maybe, a lot of things, or maybe we could have asked him certain questions. I wonder why they didn't bring this very important witness with reference to what happened to the stand.

He is their employee. He knew quite a bit about this. Apparently he was the one that introduced Cantu. I am just wondering why they didn't bring him.

Mr. Murlless didn't make any mention of the patient's card. There was a patient's card. There is [24] some question as to whether or not the agents that did swarm, I believe you will find from the evidence, through the offices, whether or not

they did pick up this particular card. It is in his handwriting. He testified he made these entries at the time.

He testified that on particular patients, it is reasonable, all the doctors do it, if there is a serious disease, if there is even tuberculosis, even cancer many people feel cancer is something they don't want anybody to know they have, not even their secretaries, so doctors do keep confidential files in their offices so nobody will know, and it is strictly a confidential relationship between that patient and the doctor.

What more normal than that this card should be on his desk? I don't think Dr. Bloch can be charged with pointing out everything. Of course he was scared. He told him he thought it was a dirty trick, and I believe it was a dirty trick, too, the way they tried to entrap this man into committing a violation of the law. Sure, you would be nervous, too, if six or seven, at least there were five, swarm in on your place of business and say you are under arrest, no warrant of arrest, not even a search warrant do they get.

And the Judge will give an instruction on that. [25]

Now, there is much ado——

The Court: On what. The Judge will give an instruction on what?

Mr. Church: On search and seizure.

The Court: Oh, well, I denied your motion to suppress.

Mr. Church: Excuse me. I didn't know whether he was going to give that or not.

Now, with reference to these office records, there was much time spent. But the doctor, with his confidential cards, I think it was explained, he gave these cards at the end of the day to the girl, but the important thing about the office records is what in the world they had to do with the material allegations charged here. They don't have one thing to do with whether or not he was feloniously selling narcotics not in the course of practice. Not a thing to do with it. That is one little dust storm I think could be left out.

Now, with reference to his analysis of the particular exhibits, he holds up a bottle and says, "It is deadly poison." That is not what the evidence said. I think the doctor said, you will recall, that if it is taken in excessive amounts, the atropine, it is a poison, and the reason that it is mixed with morphine [26] is to try to discourage the use of morphine. And it is a poison, but only when taken in excessive amounts, and the doctor testified they couldn't possibly take all this at once. It would make them deathly sick, and that is why the atropine is added to that particular solution.

Now, I think one of these bottles, he said the bottle stinks. I think that is the bottle that smelled like vitamins. I think the testimony showed Cantu carried one of them around in his pocket for two days, if I recall the testimony correctly. I don't know if it makes any difference.

Now, as I say, we feel that this doctor, in the

ordinary course of his practice, and this is very important, you are going to have to decide whether or not Dr. Bloch in good faith, to a person whom he thought to be a patient, administered drugs for the relief of suffering, or to cater to an ailment, or a craving, in the course of his employment.

Now, Cantu, every time Cantu came up there he didn't go any place else, except in a doctor's office. Isn't that where a patient goes, unless a doctor goes out on a house call, and when he got up there, I imagine he was rather impatient, and they made him wait just like any other patient, with one exception. I [27] think they said there was only one in the office one time, and he was ushered in. He was treated as a patient. A card was made out for him as a patient in the course of the medical practice.

Here is a busy doctor, 25 or 30 patients a day, and taking him in turn, and him waiting around, Cantu waiting and shifting from chair to chair, nervous, in the course of his practice.

Did he do it in good faith? There is no controverting of the statement that Dr. Bloch never knew that Cantu was a Government agent until on that day on the 19th of November he presented himself and said, "You are under arrest."

I think we all believe that. Did he in good faith think this man was a patient, administering this to him which both doctors said are treatments. I believe he did, I believe he did it in good faith, and I certainly believe he did it in the course of his practice, because if he had had any desire to slip any of this morphine-atropine solution, or anything that

would cater to the craving of an addict to them, he probably slipped it out a side door, or met him some place. He doesn't even act like a person who is dealing in the traffic of morphine. That is not the type of person that the law says violates this particular act. [28]

The law says, and the Judge will so instruct, that if this doctor in good faith, in the course of his medical practice, administered these to a person whom he thought to be a patient, then there is no violation of this law, and that is as it should be.

A doctor under the oath of Hippocrates, that every doctor has to take, makes a solemn pledge, and it is incumbent upon him to treat and relieve human suffering, physical and mental.

That is his duty. He has to do it. He has to make a decision, and if he does it in good faith, and he does it for a person whom he thinks is a patient, and in the course of medical practice, he is not guilty of any crime under this Act, and you will be so instructed.

If that is so, there is not a doctor in the United States that couldn't be held guilty under this particular Act. And it would be a terrible devastating thing to contemplate.

Therefore, ladies and gentlemen of the jury, I think the Government really found out whether this Dr. Bloch was one who was prone or even inclined to violate the Narcotics Bureau Act. It took their staff and watched him for nearly three years, and they never found one patient out of all those thousands of patients [29] that ran through Dr.

Bloch's office, not one instance did they come up with where he had violated, and so they tried to entrap him.

Now, entrapment.

Even if he were guilty of it, even if this were an improper administration of this particular drug, if the Government entrapped him into committing the crime, then there is a perfect defense there for the Defendant, because if the intent to commit the crime originates in the mind of a Government Agent, and not in the mind of the Defendant, in other words, if the defendant is put in a situation where he will violate the law, and that intention originated with the Government, there is no crime committed under this Act, and that is perfectly proper, because no private citizen should be subject to an entrapment where that desire, or the intent, the guilty intent which you must show in a criminal case originates with a Government Agent, and not with the Defendant.

I think clearly in this case that the intent to violate, the intent to manufacture a violation of this law, originated with the Government Agent and not with Dr. Bloch.

I believe that he in good faith administered a treatment to a person whom he thought was a narcotic [30] addict, or represented himself as an addict, for either the treatment of that or the relief of suffering of that particular man.

And, ladies and gentlemen of the jury, I believe that you will agree with me.

Thank you.

The Court: We will have our morning recess at this time. Keep in mind the Court's admonition.

(The morning recess was taken.)

The Court: You may proceed.

CLOSING ARGUMENT FOR PLAINTIFF

By Mr. Murlless:

I still think that this is not in the regular course of a medical practice. These series of exhibits are the regular course, if anything, of the narcotic traffic.

But we ran the gamut again. Everybody lined up and prosecuted, except the Defendant Bernard Bloch.

As I said before, we can go over it again back through every bit of it and show why it is smoke screen, and not significant, not important.

They added a new name to those that should be prosecuted in this case, and it was my turn. I figured it was going to be. I didn't know Hernandez. I didn't know Gilbert Hernandez. He is not my patient. I didn't [31] put Gilbert Hernandez where he is today, with the burden on him, with the use of morphine sulphate, a deadly poison, and I am not perpetuating the dope habit amongst known narcotic addicts. The Defendant did, this man.

I don't assume the responsibility for Gilbert Hernandez.

He says himself he treated him for two years to cure his addiction. No, at a thousand per cent on

his money, that he paid out for morphine sulphate. It figures out that way. I didn't do it. I am not responsible for the sickness that Hernandez has. That is what I am saying. That is all the Government has said. And this Defendant in the narcotics traffic.

I got tried some other way, too. I think it was with respect to Defendant's Exhibit A, but I did talk about this. I said it appears to have been written all at the same time, and I leave it to the dust.

I talked to you about it, but look at it again. He talks about good faith. Where is there a medical record of Raymond Portillo on that card? Entries of appearances. No medical record. Not an address, not his family. In the course of a medical practice, I say to you no. Like this stuff, poison without labels.

Who else did we try? Didn't prove counts [32] III and VI. That is right, we didn't, but he didn't read those, and they testified why they couldn't be proved. He didn't read you the part that made it impossible reasonably to expect to prove it, because it says that on or about the 30th day of October, such and such was done with forms, the obtaining of drugs for other than their proper purpose. Because we didn't establish within a reasonable period of the 30th day of October. It was testified to. Yes, we requested that it be dismissed. We couldn't prove it.

Then they tried the Government. For three years, he says, nobody else. He says it, nobody else says it, counsel testifies about it. The Government has

been trying to get this man. Had complaints been made against the Defendant Bernard Bloch other than these, and did they go back for a period before, and was he under investigation? The making of a complaint, or the making of a file constitutes the commencement of an investigation. And more than that, Mr. Ross took the trouble to go get the stuff that he had been requested to testify on from hearsay, and came back to court the next day, and says, "Now I am ready. I will be specific about it, about what complaints were made." And of course they don't want to talk about that. They stopped right now. [33]

These solutions, the next smoke cloud, dust cloud, these solutions wouldn't satisfy a narcotic addict. And Mr. Ross is quoted. How does he know, only from his practical experience in the Government service. And he did say that two grains might be required to satisfy—two grains a day to satisfy a narcotic addict, and he is broadly quoted as indicating that these wouldn't do it.

The same kind of thing was said about Government's Exhibit 6-A during the testimony. It was to the effect that this has a quarter grain per ounce. It is not labeled. It reads. "a quarter grain per cc., a quarter grain of morphine sulphate per cc."

As the testimony came from the stand, it takes 29 cc.'s to make a liquid ounce.

I don't know what they said, and I won't try to state it, because I don't know what the testimony was was a usual dose by injection.

The testimony was that this constitutes approximately one cc.

And I should warn you about that, too. This one isn't the one that smells, but it doesn't appear to be really tightly sealed, so maybe it is not quite a cc. I don't know how much they put in a syringe, but it looks like it might be. This contains a quarter grain. [34] It would take eight grains to be two cc., if they want to quote Mr. Ross.

Another part of the smoke screen, it could be done easily within a day.

And we are back again to 5. No, he changed it to 5 this time, and not 8 agents swarmed out there.

You see, that is the way all the way through. Just take time off. Take all of your time for the rest of the day, and maybe answer all the little inflections that constitute their serious objections to the way the case has been prosecuted, and it got to be my turn to be Plaintiff in this matter.

They don't look like things purchased in the regular course of a medical practice. They look like matters that were purchased in the narcotics traffic. Look at them.

Item number one, that is the first of the things that were testified to. Government's Exhibit 3 is one cc., contained, the testimony was, one cc.

Government's Exhibit 4-A, as I recall it, contains ten cc., I think that was the testimony. And together the first two, then, constitute eleven cc. That is right, eleven cc., the first two.

Government's Exhibit 5-A again contains ten cc. That makes 21 cc. of morphine sulphate. [35]

There is other matter there, too. But the first three, 21 cc. Government's Exhibit 6-A was 30 cc. of morphine sulphate. And that makes 51 cc.

There was in connection with 6-A dilaudid, too, but let us talk about morphine sulphate here. And altogether that is 51 cc.

Government's Exhibits 7 and 8 together constituted 40 cc. It came in two pieces, if you will recall. One a 30 cc. lot and, and then a 10 cc. lot in addition to that, that was handed to him the next day.

No examination on any of them, but this one he walked through the office and handed it to the agent, 10 cc.

And the last of the items was the one that was bought with the 50 dollars of marked money. It was twenty cc.

Altogether of morphine sulphate, about 101 cc. purchased by the statement of the Defendant himself, at the rate of about $1 per 30 cc., $3 worth of morphine sulphate. And for the morphine sulphate was paid $235. $235.

Now, ladies and gentlemen, there is one thing they didn't accuse Mr. Cantu of. They didn't accuse him of wanting to lose his job. I don't know how he struck [36] you, but he struck me as a man, for some time he has appeared to be a man who doesn't want to lose his job. They admit somebody, somebody in the case lied. But they don't accuse Mr. Cantu of wanting to lose his job. They don't accuse him: If he had falsified the figure $235, or where he was upon the days that it was stated here, if he had falsified any of that. He stated to you those reports were made under oath. He would lose his

job. And even they don't accuse him of wanting to do that.

That is what was paid, $235, which I calculated roughly as something in excess of 1000% upon the investment, not in the medical practice, ladies and gentlemen; in the narcotics traffic.

Thank you.

(Which concluded arguments of counsel to the jury of the trial of this case.)

I certify that the foregoing is a true and correct transcript of proceedings had in the above-entitled cause on the date specified herein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 29th day of February, A. D. 1956.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed February 29, 1956.

In the United States District Court for the District of Arizona

No. C-12340-Phx.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BERNARD BLOCH,

Defendant.

PROCEEDINGS UPON DEFENDANT'S MOTION FOR NEW TRIAL

Transcript of Proceedings had in above-entitled case before the Honorable Dave W. Ling, Judge of said Court, upon Defendant's Motion for New Trial, in the courtroom in the United States Court House, at Phoenix, Arizona, on the 13th day of February, A.D. 1956, at 11 o'clock a.m.

PROCEEDINGS

The Clerk: C-12340 Phoenix; United States of America versus Bernard Bloch. For approval of Mandate of U. S. Court of Appeals, and Defendant's Motion for New Trial.

Mr. Murlless: Plaintiff is ready.

Mr. Lavine: Defendant is ready.

The Court: All right.

Mr. Murlless: The Mandate, we believe, is correct, your Honor, and should be spread on the record.

Mr. Lavine: We oppose approval of the Mandate, if your Honor please. There are matters

which we shall present on our Motion for New Trial, and we would like your Honor to withhold the ruling until after we argue our motion.

The Court: All right. I will hear your motion.

Mr. Lavine: May it please the Court. At this time Bernard Bloch moves for a new trial on all the grounds set forth in our written Notice of Motion and our written Motion filed with your Honor, and our Points and Authorities which we have set out in that motion.

We also ask your Honor to declare the judgments on each of the counts void, as being in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and upon the matters which I intend to present and have presented by affidavit.

As I have looked at your Honor's wall here, I was [2*] very much impressed with the motto that we often look at but perhaps seldom read: "Truth always rises above falsehood as oil rises above water."

The Court: Not always. I have sat here for twenty years now, and I know it doesn't.

Mr. Lavine: We will try to have it rise in this case, your Honor.

The Court: All right.

Mr. Lavine: If your Honor please, one of the grounds of our motion is that evidence which was in the possession of the prosecution was withheld from the defense, so that it could not be presented at the time of the trial.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Your Honor heard the evidence in this case, and the essence of the charges, and the essence of the proof of Officer Cantu was that he did not want these narcotics for himself, but for girls, for prostitutes whom he claimed were working for him. And that is shown by the record which was printed up; and it is referred to in various places, both on direct examination and on cross-examination. Pages 104 and 105, page 120 of the printed record, and page 132.

Now, in this matter Cantu stated that he had got this information from Hernandez, and that Hernandez was present when he had a conversation with the defendant, and heard the conversation about this matter of not having the narcotics for himself, but for prostitutes. [3]

Hernandez was also known as Mr. Portillo, spelled P-o-r-t-i-l-l-o, although Hernandez is his true name.

At that time Mr. Hernandez was under subpoena by the government. He at that time was in the employ of the government. He was being paid by the government, and they had him where they could produce him to corroborate the testimony, or not produce him.

And, furthermore, they not only had him, but counsel, who sought to interview Mr. Hernandez to determine the true facts of the matter, tried to get in touch with Mr. Hernandez, a counsel named Wade Church, who is known to your Honor, and instead of letting Hernandez tell him the facts, they tried to get Mr. Hernandez to entrap Mr. Church

into offering him, Hernandez, a bribe, which Mr. Church did not do.

Now, whatever reprehensibility there is to that kind of conduct when a lawyer is seeking information from a witness who is vital to the defense, is added to by the fact that they told Hernandez, in the uncontradicted affidavit before your Honor, not to disclose anything to defense counsel, and not to disclose what his testimony would be in relation to the government and the representations that Hernandez made.

This case rested, your Honor, upon the credibility of one or the other person. Either Cantu was telling the truth or he was lying. Either Dr. Bloch was telling the truth or he was lying. [4]

And we come right to the principle set forth in Gordon versus the United States in 344 United States at page 414, particularly at page 418, where the Supreme Court of the United States said:

> "The trial judge in his charge and the Court of Appeals in its opinion recognized that, where, as here, the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny."

Now, in that case the Government had failed to produce statements of witnesses that were in its possession which would have contradicted the one witness produced by the Government. And in an opinion unanimously reversed by the United States Supreme Court, no dissents in this one, the Court held that the defendant was entitled to have the

information in the possession of the Government, and the Court quoted at length:

> "Despite some contrary holdings on which the courts below may have relied, we think their reasoning is outweighed by that of highly respectable authority in state and lower federal courts in support of the view that an accused is entitled to the production of such documents. Indeed, we would find it hard to withstand the force of Judge Cooley's observation in a similar situation that [5] 'The State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.' "

Now, we have here a situation where evidence was in the possession of the Government. Had they put Mr. Hernandez on the stand—they were relying on Mr. Hernandez' presence, the officer testified about it—had they disclosed, or had they permitted disclosure to the defense in an interview which Mr. Church sought, in three interviews, I believe, which Mr. Church sought, at least one in which they tried to entrap him into saying something else instead of getting the facts, then all of the facts would have been before the jury, and the jury would have had not only the doctor's testimony, but the testimony of the other witness whom it was claimed heard the conversation, and who would have been able to have testified as set forth in the Hernandez affidavit before your Honor, that no such matter occurred, and

no such conversation occurred as represented by Mr. Cantu.

The affidavit before your Honor discloses that he was present, that he, Hernandez, was present at all times that Cantu was present, and that at no time was there anything stated by the said R. S. Cantu to the said Bernard Bloch, or to anyone, that the said R. S. Cantu was a peddler of narcotics. At no time was anything stated that the said R. S. Cantu, by [6] the said R. S. Cantu or anyone else, that said R. S. Cantu was in need of said narcotics for girls that were in his employ, namely, prostitutes.

So, if your Honor please, it would have directly contradicted Cantu and would have substantiated the testimony of Dr. Bloch and would have been on all fours with the holding in the Gordon case.

Now, in the case of Coates versus United States, 174 Federal Second at 959, we have a somewhat similar situation, in the United States Court of Appeals in the District of Columbia Circuit. There defense counsel had gone to find out about a robbery of which the defendant was charged. The robbery was supposed to have been in a crap game, and there was supposed to have been a $20 bill with blood on it. There was a police officer who had gone to the place where the robbery had occurred and had investigated the whole matter and found no evidence about any $20 bill there, and he would have corroborated the defendant's story.

The Court of Appeals for the District of Columbia held that that testimony which was not obtainable and was not furnished to the defense until

after the trial was over was newly discovered within the meaning of Rule 33, and they remanded the case for a new trial based upon that newly discovered evidence.

We think the case closely parallels, if it is not on [7] all fours with, the instant case, in which the evidence here was suppressed from the defense and his counsel, and wasn't obtainable until after the trial was over, and in fact some time subsequent to the trial, and was newly discovered within the meaning of the Rule.

So I assert respectfully, your Honor, that in respect to this one situation, this one witness against another, if the evidence is corroborated and available now to the defendant, it should be permitted, the defendant should be permitted to produce it and to produce it in a new trial.

There is another situation, your Honor, which is highly worthy of your Honor's consideration of this motion. During the course of the trial, the prosecutor asked the defendant if he had ever been convicted of a felony.

Your Honor will recall that six months before there was an income tax case involving a tax matter of a thousand dollars, and the defendant had been convicted, and the conviction went up on appeal. And at the time of the trial the appeal had not been acted upon in our busy Circuit Court of Appeals, so the defendant was then forced to answer truthfully, as he did, that he was convicted of a felony, but the case was on appeal.

However, again we have a question of credibility

there, and again the question was of the credibility of Cantu, the officer, or the defendant, whose credibility was now [8] seriously impaired, in fact, if not fatally impaired by the asking of that question. Now, as time went on, that conviction was reversed, but also this case had already gone to the jury, and the jury found Dr. Bloch guilty, because in the weighing of the scales of the officer as against one who had been previously convicted of a felony, the scales weighed more heavily in favor of the officer than it did of the defendant, and his credibility was very badly damaged.

Now, the prosecutor gambled. He knew that the other case was on appeal, and having known that fact, and having risked his case by asking the question, he should now suffer the consequences.

I have searched far and wide. The Circuit Court passed on the question of whether it was proper to ask the question. They say that if the United States Attorney acted in good faith in asking the question, that then it was under a conflict of authorities of the different circuits proper. But it does not appear that in the Circuit Court of Appeals, nor in the subsequent proceedings, that the question of the effect of a reversal of the first conviction was brought up, or raised, or argued, or presented either to the Circuit Court or on to the Supreme Court of the United States.

I, therefore, within the time still allowed, I filed it last Friday, a petition for rehearing in the Supreme Court of the United States, asking that Court to reconsider [9] the matter of that point, which

was the only point raised in the petition for certiorari originally, but I expanded it on the ground that that issue had not been finally considered or determined by the Circuit Court of Appeals, nor by the Supreme Court of the United States.

I must state to the Court that I did find, subsequent to the writing of that petition, and subsequent to the filing of this motion, I found a case in the California court in which that subject had been raised, but it was raised under a California statute, which permits the impeachment of a witness for any prior conviction of a felony, and the California courts have held that even though the case is on appeal that it was proper to ask the question during the time of the pendency of the appeal. However, in this particular case, the appeal was subsequently reversed, and the issue was also injected there as to the effect of the whole matter, including the reversal, and the Court, the California court held that it was proper for the attorney to ask the question during the pendency of the appeal, but they reversed this case on other grounds. They still reversed the case, but on other grounds, the misconduct of the prosecutor, so that that issue never went back on rehearing. And so I do feel that the Court should know that particular somewhat parallel situation was raised in the California Supreme Court. It was a parallel situation, where the judge had been reversed. [10]

It is in 92 Pacific Second, page 402, at page 405. People versus Braun. I just discovered the case yesterday.

However, your Honor, the case merely in its language passes on the propriety of the prosecutor asking the question during the pendency of the appeal, and has no discussion as to the effect of the reversal of the first conviction, as we have here.

However, your Honor, in the United States courts there is no statute I know of that permits such an impeachment. It falls under common law. And I submit, your Honor, that where the prosecutor gambles, as he did here, on the outcome of the first appeal, knowing that the case was still under appeal, and the first appeal was reversed, that a new trial should be granted in this case, so that the defendant may appear before a jury without the stigma of a non-existent prior conviction of a felony.

As stated in a case I cited to your Honor in my Points and Authorities, Campbell versus United States, that "it seems to us wholly illogical and unfair to permit a defendant to be interrogated about a previous conviction from which an appeal is pending. If the judgment on the conviction is later reversed, the defendant has suffered unjustly and irreparably the prejudice, if any, caused by the disclosure of the former conviction."

And we submit, your Honor, that in this case the [11] defendant has suffered irreparably where the issue was his credibility or Cantu's credibility.

Now, if your Honor please, the affidavit of Mr. Hernandez discloses a course of conduct on the part of the officers in this matter which I feel that your Honor could not in due justice approve. The conduct of the officers, as long as they are conducting

themselves as officers, if they do anything illegal or reprehensible, that is their own affair. But when it comes into court and the Court then puts its final stamp of approval upon it, then it not only becomes the act of the officers, but it becomes the act of the Court as well.

And Mr. Justice Holmes in Olmstead versus the United States, in 277 United States condemns that kind of conduct by any officers, and while he discusses a matter which came up in a wire tapping case—and I understand your Honor has had something about wire tapping here lately which the Supreme Court of the United States has taken over, and you are probably quite familiar with this and the other decisions on the subject—while it deals with other types of offense and not this type of offense, Justice Holmes' condemnation of the conduct of the officers is that the courts cannot properly adopt what the officers have done, because if they do that, then the Court itself has adopted the improper conduct of the officers. And also Mr. Justice Brandeis in a very lengthy opinion, which was later approved in subsequent cases, has [12] condemned this type of action as being against the interest of the Government.

Now, in connection with the affidavit of Hernandez, and in connection with all the evidence in this case, it shows a pattern of entrapment which your Honor has had before you, and which in Sorrells versus The United States is condemned as something that can be interrupted at any stage of the proceedings.

Your Honor has had that issue before you before this time, but I renew it here, because we have a great and important situation of an individual here, a man who is a professional man, and this judgment isn't merely a judgment of imprisonment, which he could do, but it is the wrecking of a career, it wrecks his whole life. It goes to the heart of everything that he has worked for and accomplished. And he did not initiate this matter. He was treating a man whom the Government put in its employ, and then had that man seduce him. There was a seduction in this case as much as a man is often charged with seducing a woman. It was a seduction because the defendant did not go out seeking Cantu. Cantu came seeking him. Then the Government employed Hernandez whom they knew was an addict, and I submit, your Honor, that that kind of conduct ought not to receive the final approval of this or any other American court.

Now, there is one other feature in this case [13] which must be considered by your Honor, and that is the duty of the United States attorney. That duty in producing the evidence is a duty which he had not only to produce the evidence for the Government, but the evidence which might help the defendant in this case. The United States attorney is a minister of justice. He is a quasi-judicial officer. All of the books call him that.

In State versus Osborne, in 103 Pacific at page 62, it is stated:

"It will not do to say that courts are impartial, and that both the courts and district attorneys are

there to protect the accused from wrong as well as to convict the guilty. The law is intended not only for protection against the acts of those who knowingly or intentionally err, but against those as well who do wrong unintentionally, or from an erroneous sense of duty. As stated by the Supreme Court of Michigan in People v. Murray, 89 Mich. 276, 286, 50 N. W. 995, 998, 14 L. R. A. 809, 28 Am. St. Rep. 294: 'It is for the protection of all persons accused of crime—the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule must be observed and applied to all.' " [14]

In Berger versus United States, a late case, on the duties of the United States attorney the court there stated:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a

wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed."

Now, the Court goes on to discuss the way it would be observed in that case, but we have in the instant case a [15] matter that was in the possession of the United States Attorney which we feel it was his duty to produce and to disclose to the Court, as well as to counsel, and to give them an opportunity fairly to present the issue on this one issue of credibility. And having failed to do so, we feel that the Court now in its sound discretion should grant a new trial, so that the issues may be fairly tried with all the facts before it, including those which were not produced, but which were within the possession of the Government to produce, and which were in the possession of the Government to enable the Court to know them, and to enable defense counsel to know them.

We submit that on these grounds, as well as on the other grounds which we have set forth in our motion that this court should now grant a new trial. I have cited other cases in my Points and Authorities. I think it is not necessary to go over them. Your Honor is familiar with them.

I urge your Honor to grant a new trial, and also to hold each of the judgments herein pronounced as null and void.

There is one other matter, your Honor, that ap-

peared in my motion, and that is that if the testimony of Hernandez is to be believed, and if the testimony of Dr. Bloch is to be believed, then Cantu's evidence was knowingly perjured. Cantu was an officer of the Government. I do not charge the Government counsel, I charge the Government agent, however, [16] with having produced false testimony in this matter, which we had no opportunity of proving was false at the time of the trial.

As stated in the Mooney versus Holohan case, where a judgment is based upon false testimony, then the due process is violated, and that judgment is a nullity.

And also, in connection with the affidavit of Hernandez, he points out that some of the medicine was given to him and was not entirely in the possession of Cantu, and if that was true, then Cantu's testimony also was false.

In my Points and Authorities, I also cited cases which held that where a conviction is based upon perjured testimony that the Court should grant a new trial.

I submit it, your Honor.

Mr. Murlless: I think counsel's argument overlooks that citation which has been reviewed by the Circuit Court of Appeals, at least once by the Supreme Court of the United States, as the rule of law in this case. It is reported, Bloch vs. United States of America, CA Ninth Circuit, October 12, 1955, in 226 Federal Second at 185.

We resist the motion and have served on counsel a copy of the resistance to motion for new trial.

We think it would be unreasonable to expect that the Government could file affidavits with the freedom and lack of responsibility that is shown in this case. Either six or [17] eight affidavits have been filed, some of them alleging flagrantly false accusations. That it not appear that they are true, I made an affidavit which I would like to lodge with the Court. I don't think its filing is necessary. I swear to its truth.

Mr. Lavine: May we see a copy?

Mr. Murlless: And have signed it, and will serve a copy on counsel.

The Court could not be interested in anything at this time except that which is new, that which is new and that which is relevant. And when I say "new," I mean that which has not been reviewed by this Court twice or three times, by the Circuit Court of Appeals twice, and by the United States Supreme Court at least once.

If there is anything new in any of this last spate of affidavits with which we have been served, it is the use of a new word, that Gilbert Hernandez was secreted during the course of the trial.

I know he wasn't. There is any number of persons that knows that is not true, but for the purpose of this record, if it serves the Court's problem, I made an affidavit that I saw him in the courtroom as I turned from examining one of the witnesses during the course of this trial. That is the only thing here that is new. And the reason I dwell upon the word "new" is because, if your Honor please, the [18] rule of law with respect to whether or not

there was prejudicial conduct of counsel, or prejudicial error in connection with questions asked, the question of whether or not the jury was instructed with respect to entrapment, and this Court's consideration, has been reviewed in these two things, in connection with the evidence with respect of which the Court did instruct on entrapment, have been reviewed at least, after the jury's verdict, twice by this Court, twice by the Circuit Court of Appeals, and at least once by the Supreme Court of the United States; and the rule of law, if that is what he is searching for, is I think reported upon the appeal in this case, and it is to the effect that there is no prejudicial error, there was no prejudicial misconduct of counsel. And I think the Circuit Court of Appeals says that the evidence did not necessitate an instruction on entrapment.

As I recall, this court gave an instruction that was characterized by the Circuit Court of Appeals as abundantly fair. I am not sure I used the exact words.

The Court: No, it was "out of an abundance of caution." I never can tell what they are going to hold up there.

Mr. Murlless: We urge, if your Honor please, that the mandate be spread, that the next procedure be taken in this matter, that is, an execution of the Court's sentence which was made and signed, and upon which there was an appeal so many months ago. [19]

Mr. Lavine: May it please the Court. I am surprised at the paucity of counsel's affidavit. It con-

cedes that all of the other portions of Hernandez' affidavit are true by reason of the fact that there is no denial of it.

And Hernandez has stepped forth and said that he was not permitted to tell defense counsel in the trial about his presence, and the facts of the matter as they existed and were narrated by Cantu in his testimony.

Now, the mere fact that Hernandez was in the courtroom on one day didn't enable defense counsel, who had sought to get the information, to get that information, nor to find out what the true facts are.

The Government has no right to instruct a witness not to disclose the true facts. There is no denial of those matters set out in Mr. Murlless' affidavit.

The case is on all fours with this case in the District of Columbia, which the District of Columbia Circuit Court reversed, in Coates versus United States, where the police officer was not permitted and did not give the information to the defense which they were entitled to have, and which they couldn't inquire and couldn't know about until the trial was over.

And here we have a parallel situation, your Honor. We are not talking about entrapment at this point. We are talking about new evidence which we have produced by affidavit [20] and which stands clear before your Honor as uncontradicted in any respect. In respect to the gravamen of the charges here, the testimony of Cantu that these narcotics were to be used for prostitutes, and Hernandez was supposed to have heard Cantu make the

statements, and Cantu was supposed to have made the statements to Dr. Bloch, and yet we find there was no way of verifying those facts until after the trial. And we are here presenting them to you now on our first opportunity to do so.

I submit, your Honor, that in all fairness a new trial should be granted.

The Court: I don't know whether I have the legal right to grant your motion.

Mr. Lavine: Yes, your Honor, I have authority on that.

The Court: Well, I will tell you what confronts the Court. As a matter of law, or as a matter of the record you have made, if the court would enter an illegal order, the Government, of course, could appeal on that ground. If the Court shouldn't grant the motion for a new trial, that is an appealable order.

Mr. Lavine: On the motion for new trial, your Honor?

The Court: Yes. And it would be an appealable order by the Government, also.

Mr. Lavine: Yes.

The Court: So I think I will place that burden on you. [21]

Mr. Lavine: It is an appealable order on either party.

The Court: Yes. So I will place that burden on you.

Mr. Lavine: The Supreme Court has often said that you are the one who has to pass on it first.

The Court: The Supreme Court isn't in it now. The Supreme Court will enter later.

Mr. Lavine: The Supreme Court says you are the one to pass on it first.

The Court: I will just deny it now and order the mandate spread on the minutes of the Court.

Mr. Lavine: If your Honor pleases, we have an appeal which we desire to present to the Court at this time, and we would ask your Honor to fix bail under Rule 46(2), pending appeal.

The Court: I won't fix bail either.

Mr. Lavine: Can I cite your Honor an authority on that?

The Court: You can cite authorities to substantiate anything.

Mr. Lavine: This is a new case, by Justice Douglas.

The Court: I could tell you something about that, too. I think I even know the case.

Mr. Lavine: The Walcher case?

The Court: No, that isn't the one I have in mind.

Mr. Lavine: You were thinking of this wire tapping case, I think. The Walcher case. It came down December 31st. [22]

The Court: All right. Make your application to the Court of Appeals. I am sure they will grant it.

Mr. Lavine: Will your Honor stay the judgment long enough for me to have a chance to present it to the Court of Appeals? The first time that can be heard is February 27th.

Mr. Murlless: I move the defendant be remanded

to the custody of the United States Marshal for the execution of sentence.

Mr. Lavine: I think we should have our right to have our day in Court on this.

The Court: You may have your day in court.

Mr. Lavine: May we have until the 27th?

The Court: No. The defendant will be committed to the cusody of the Marshal pursuant to the mandate.

Mr. Murlless: May his bond be exonerated, if your Honor please?

The Court: Yes.

(Which was all of the proceedings had in the above-entitled matter at said time and place.) [23]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 15th day of February, A.D. 1956.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed March 12, 1956. [24]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Plaintiff, vs. Bernard Bloch, Defendant, numbered C-12340 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copy of minute entry dated February 13, 1956, is a true and correct copy of the original thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that the said original documents, and said copy of minute entry constitute the record on appeal in said case as designated in the Designations filed therein and made a part of the record attached hereto and the same are as follows, to wit:

1. Indictment.
2. Verdict.
3. Judgment and Commitment.
4. Defendant's Motion for New Trial and Notice of Motion filed February 9, 1956, with affidavits of

Gilbert Ruiz Hernandez and of Wade Church attached.

5. Affidavit of Bernard Bloch, filed February 10, 1956.

6. Affidavit of Robert S. Murlless, filed February 13, 1956.

7. Minute Entry of February 13, 1956, including order denying Defendant's Motion for a New Trial (and to Vacate and Set Aside Judgment).

8. Mandate of U. S. Court of Appeals affirming judgment (Opinion not filed).

9. Order denying bail pending appeal.

10. Defendant's Notice of Appeal.

11. Reporter's Transcript of Proceedings had on February 13, 1956, filed March 12, 1956.

12. Reporter's Transcript of Arguments to the Jury May 27, 1954, filed February 29, 1956, designated by appellee.

13. Appellant's Praecipe (designation) for Record on Appeal, filed February 13, 1956.

14. Appellee's Counter Designation of Record on Appeal, filed February 23, 1956.

I further certify that a reporter's transcript of proceedings of December 20, 1954, and of testimony of Bert C. Dobbs taken February 28, 1955, have not been filed in this case, and that no proceedings were had in said case in this court on February 28, 1955 (Items 6 and 7 of designation).

Witness my hand and the seal of said Court this 13th day of March, 1956.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 15066. United States Court of Appeals for the Ninth Circuit. Bernard Bloch, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed March 15, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15066

DR. BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF POINTS ON APPEAL

Pursuant to Rule 17(6), appellant herewith designates his Statement of Points on Appeal in the above-entitled cause:

I.

The District Court has jurisdiction to grant the Motion for a New Trial upon the basis of newly discovered evidence, under Rule 33, Rules of Criminal Procedure for the District Courts of the United States.

II.

The District Court erred in failing to grant the Motion for a New Trial on the basis of newly discovered evidence, under Rule 33, where the newly discovered evidence was unavailable to the accused at the time of trial.

III.

The District Court erred in failing to vacate and set aside the judgment on the basis of evidence wilfully suppressed by the prosecution. Such conduct denied appellant fair trial guaranteed by the Fifth

Amendment to the Constitution of the United States.

IV.

The evidence showed that the witness for the Government, a government officer, knowingly committed perjury. Conviction, therefore, was based upon evidence knowingly perjured in violation of the Fifth Amendment to the Constitution of the United States.

V.

The District Court erred in failing to grant a new trial based upon the fact that evidence relating to a prior conviction of the appellant, which was pending on appeal, was later reversed subsequent to the trial; nevertheless, this alleged prior conviction went to the credibility of the appellant in the trial and affected the fairness of the trial, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

Dated: March 30th, 1956.

MORRIS LAVINE,
Attorney for Appellant.

[Endorsed]: Filed March 30, 1956.